# EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

APPLE INC., Plaintiff, vs. MASIMO CORP, et al., Defendants.

Case No. 22-CV-1377-MN-JLH

Case No. 22-CV-1378-MN-JLH

TRANSCRIPT OF MOTION HEARING

MOTION HEARING had before the Honorable Jennifer L. Hall, U.S.M.J., in Courtroom 2B on the 15th of June, 2023.

APPEARANCES

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-and-

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(Appearances continued.)

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THE COURT: So we're here today to hear motions in two cases. One is *Apple versus Masimo and Sound United*, and that's 22-CV-1377-JLH. And the other is also *Apple versus Masimo and Sound United*. That's 22-1378.

Let's have appearances starting with Plaintiff.

MR. MOORE: Good morning, Your Honor. David Moore from Potter Anderson on behalf of Apple. I'm joined by my partner Bindu Palapura. We're joined by our co-counsel from Desmarais Kerri-Ann Limbeck, Jordan Malz, and Jamie Kringstein. And from WilmerHale we're joined by Jannifer Milici and Mark Ford. And from Apple, Natalie Poe and Megan Thomas-Kennedy.

THE COURT: Hello. Good morning, everyone.

MR. PHILLIPS: Good morning, Your Honor. Jack Phillips of Phillips, McLaughlin, and Hall. With me in the courtroom are Steve Larson, Brian Horne, and Adam Powell from Knobbe Martens.

THE COURT: Good morning, everyone.



It's my understanding that we have four motions pending, but we're only going to hear two of them today. And we've given each side 15 minutes.

These are Plaintiff's motions, actually, so we'll hear from Plaintiff first.

MS. LIMBECK: Good morning, Your Honor. Kerri-Ann Limbeck on behalf of Apple. I'll be addressing inequitable conduct and my co-counsel will address antitrust and false advertising.

Masimo asserts inequitable conduct in both of these cases not against any counsel that actually prosecuted the asserted patents. Instead, they assert it against a mishmash of Apple as a whole, its chief of IP, unnamed others at Apple, and in the Design case only -- all 21 named inventors collectively. Those allegations cannot meet the heightened pleading standard under Rule 9(b).

So starting with Apple's chief IP counsel, Jeffrey Meyers, Masimo did not and cannot plead that he even had a duty of disclosure in either the utility patents or the design patents because they did not plead that

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he's an inventor, that he's the attorney or agent that prosecuted or prepared the applications, or that he was substantively involved in prosecution. In the Utility case, its only allegation is that Mr. Meyers was an attorney of record for prosecution. Masimo pleads no facts and cites nothing in support of that bare allegation. In fact, it's false. Mr. Meyer's name doesn't appear in the prosecutions.

In the Design case, Masimo pleads even less. Its only conclusory allegation is that Mr. Meyers had a duty to disclose, but Masimo did not plead that he was substantively involved in prosecution to give rise to that duty.

So additionally, Masimo did not and cannot plausibly plead in either case that Mr. Meyers had the requisite knowledge and specific intent. In both cases, Masimo fails to allege any facts from this Court could reasonably infer that Mr. Meyers actually knew of any of the references that they identified as being allegedly withheld from the Patent Office, let alone that Mr. Meyers knew of the

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specific technical disclosures within those references and deliberately withheld them with specific intent to deceive the Patent Office. The only conduct that Masimo actually attributes to Mr. Meyers in its pleading is that Mr. Meyers and others at Apple hired different law firms to do different things, to prosecute design patents, utility patents, and handle IPRs. That is not sufficient to plausibly plead that Mr. Meyers deliberately compartmentalized these particular prosecutions with intent to deceive the Patent Office, and that's why Masimo cannot cite a single case in support of that entirely novel theory. So Masimo's allegations against Mr. Meyers fail for those reasons.

Now, in the Design case specifically, Masimo has this additional allegation that the entire group of all 21 design inventors collectively committed inequitable conduct. Those allegations fail too because Masimo doesn't even allege that a single named inventor knew of any of the references that it cites that were supposedly withheld during prosecution, let alone that every single

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inventor knew of those references, knew of the specific disclosures within the references, and withheld them with an intent to deceive. The only allegation against the Design inventors specifically is that, on information and belief, they knew the claimed designs were functional and not ornamental as a result of the exposure to the development process. Basically, because they're inventors, they were exposed to the development; therefore, they must have known these patents were invalid for functionality.

THE COURT: Can I ask -- and I probably won't be able to articulate this very well, but maybe you'll catch my drift.

I understand that the Federal Circuit caselaw is very clear that you need to identify individuals that are substantively involved and you need to satisfy Rule 9(b). Arguably -- or maybe not arguably. It was clear it was doing that because it was trying to curb the amount of inequitable conduct claims that made it past the pleading stage.

But is there something inherently wrong with the idea of the inequitable conduct claim

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that they're trying to put forward, which is that if you've got a big company where there's somebody in charge, and we want to get both design patent claims and utility patent claims -- this is what they're saying. I get it you disagree -- on the same aspects of an invention and there's a person up there that says, okay, you guys are going to be the inventors on this one, and you guys are going to be the inventors on this one. The inventors might not really know anything about why they're listed on one or the other patent. Can that never be inequitable conduct, or is it just not inequitable conduct here for some reason?

MS. LIMBECK: It's not inequitable conduct here because as you mention, the Federal Circuit under the *Exergen* standard requires that you actually allege that there's some specific individual that knew -- that had a duty of disclose sure in these prosecutions and actually knew of some invalidating reference that was withheld.

THE COURT: Let me just ask. You say it's not here, but it looks to me like you're

also saying it could also be inequitable conduct if the person in charge doesn't have a duty of disclosure under the PTO rules.

MS. LIMBECK: Yes, Your Honor, I think that's true because when you just are pleading -- it basically amounts to a pleading against Apple as a company as a whole, which is exactly what the Federal Circuit has said cannot meet the pleading standard. If you're 10:11AM just going to pick a name at the top of the legal department for Apple, that's basically the same thing as just accusing Apple in general without actually pleading any particular facts tying Mr. Meyers to these 10:12AM particular prosecutions and even saying that he's the one that hired these different law firms. Apple has thousands of prosecutions every year. Of course they have multiple law firms. That's standard practice. That's not 10:12AM inequitable conduct.

Unless you have any other questions, Your Honor.

THE COURT: No, that's it. Thank you very much.

10:12AM MS. LIMBECK: Thank you.



MS. MILICI: Good morning, Your Honor. Jennifer Milici from WilmerHale.

Your Honor, as we explained in our brief, Masimo's antitrust claims fail at every turn. 10:12AM Masimo's counterclaims are a mishmash of conflicting allegations that Apple stole the intellectual property of Masimo and others, sought confidential information from App Store Developers, and yet then flooded the market 10:12AM with somehow inferior products that somehow hurts the health watch market.

Taking the actual allegations as true for the purpose of the motion, these allegations cannot add up to an antitrust violation. We've 10:13AM listed three independent grounds on which the claim should be dismissed. I'm happy to start wherever you like or answer questions.

THE COURT: Well, agree with you that there's a kitchen sink. But that's not 10:13AM surprising, given that courts look very carefully at antitrust allegations, and you want to get in everything you can get and don't want it to be dismissed.

What about the Walker process? You 10:13AM agree it doesn't say the Walker process. Why



don't you focus on that.

MS. MILICI: Your Honor, we agree that it does not state a Walker process claim. As my co-counsel just explained, the 10:13AM inequitable conduct allegations fail. But even if you look at antitrust injury -- and just in general, Masimo has failed to allege an antitrust injury and certainly hasn't put forward any other theories. It doesn't even 10:13AM try.

But as to its Walker process allegations, its argument appears to be that if Apple were to succeed on a fraudulently obtained patent, then at that point they would be excluded. 10:14AM This is an impossibility. If Apple were to succeed in excluding Masimo, it would be because it asserted a valid patent that's uninfringed. There's no way the outcome of this litigation can be that Masimo is illegally 10:14AM included.

I want to factually distinguish this case from something like *TransWeb*. In *TransWeb*, you had a plaintiff who alleged that because it was unable to meet the costs of litigation, it had 10:14AM to sell part of its business at a fire sale



price. It lost customers. You saw in that case that a jury awarded lost profits from an injury that happened because of the pendency of the litigation itself. The Court did talk 10:14AM about whether attorney's fees can be antitrust damages, but it did so in the context of the case where antitrust injury and liability had been established and were not contested. Those were not contested on appeal.

If we look at Masimo's allegations here, 10:15AM not only do they fail to allege that the cost of litigation is going to somehow impair their ability to compete, they allege the opposite. In paragraph 21 of their complaint, they 10:15AM affirmatively allege that they have the resources to litigate this case, so this is nothing like the situation in *TransWeb* where the litigation itself is going to cause harm.

THE COURT: Let me make sure I 10:15AM understand. Your view is -- let me ask it this way. You're seeking an injunction; right?

MS. MILICI: Yes Your Honor.

THE COURT: So if you won, they would be enjoined; right?

10:15AM MS. MILICI: Yes, Your Honor.

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THE COURT: We're going to take this real slow because it's still early for me and the caffeine hasn't kicked in yet. So their choice is either be enjoined from selling or defend the litigation; right?

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MS. MILICI: Your Honor, I understand that that's how *TransWeb* set it up. I do want to point out that they are not challenging all of the patents that are being asserted by Apple in this case, and that's just another distinguishing feature.

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THE COURT: Got it. Okay. I understand.

MS. MILICI: So -- and, Your Honor, I think that this came up in another case before Your Honor, the *NRT* case. And again, we see the distinguishing features there in a case like *NRT* or *Bard* that they cite. You have a plaintiff that was alleging that the litigation itself caused harm to competition, not just if the plaintiff had been successful in asserting a fraudulently obtained patent.

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I would also say that if you read *TransWeb* in the way that Masimo suggests, I think it runs directly into Third Circuit

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precedent. You see the Third Circuit in cases like *Host International* which says that speculative harms are not sufficient to state an antitrust injury. It can't be a speculative harm, can't be a potential harm. You have to show facts that show actual injury.

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And the injury Masimo is complaining of is not just speculative. It's impossible. There's no way that Apple can succeed on a preliminary injunction if the patents were actually fraudulently obtained because they are able to raise that defense in this case.

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THE COURT: I need to make a note. Hold on one sec.

Okay. Go ahead.

MS. MILICI: Thank you, Your Honor.

And to be clear, as far as antitrust injury goes, that's the only argument that they make. They do not make any -- have any factual allegations supporting an antitrust injury from any of the other conduct that they allege. They are not alleging that there's some portion of the market that's been -- that they're foreclosed from. It's not like a location where they say they have access to some retail

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channel. They're really alleging injury to itself as a business, which there's plenty of caselaw that says that's not sufficient. Even a plaintiff that's been harmed has to allege a wider impact of the allegation, and the other claims in the complaint other are conclusory.

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THE COURT: Understood.

MS. MILICI: I'm happy to talk about the anticompetitive conduct on this.

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THE COURT: Why don't you hit those. We talked about the Walker process where the conduct is sued.

MS. MILICI: We talked about the Walker process. In addition, Masimo alleges that Apple infringes intellectual property. We cited caselaw from across the country showing that infringement of intellectual property cannot be a basis for an antitrust claim. If you look at cases like *Philadelphia Taxi* which wasn't dealing with intellectual property, but it really states the proposition clearly that conduct that brings more competitors to market can't be exclusionary conduct. In that case, it was even people who entered the market illegally through illegal conduct. That's

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still pro competitive. It brings competitors to the market. It can't be a basis for the antitrust claim.

Moving on to the allegations, Masimo alleges that there's a monopoly leveraging. As Your Honor stated in *Simon and Simon*, monopoly leveraging is not a standalone claim. You need to allege unlawful conduct, and Masimo hasn't done that. In its opposition brief, it references seeking confidential information as if that's an unlawful act. Of course, Apple, like everybody else, has the right to choose who they will deal with and on what terms, and Masimo points to no caselaw saying that somebody is unable to ask for information.

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I think if you look really closely at the actual paragraphs in the complaint on this, they don't ever allege that they gave any confidential information to Apple or that Apple did anything with that confidential information. It's just this kind of theoretical proposition that they could have given information to Apple or somebody else might have and Apple might have misused that, but that's not in his complaint.

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In addition, either, the harm they're conclusorily asserting from that is that somehow it might stop somebody from wanting to invest or innovate, but they don't allege anything Apple did caused them to stop investing. In fact, they alleged exactly the opposite, that they're investing like gangbusters and ready to go. So they pled themselves out of court on each of these issues.

Finally, on false advertising, courts apply a very high standard to antitrust claims based on false advertising. Otherwise, the courts would be chock full of people complaining that its competitors -- that they don't like their competitors' ads and they're entitled to treble damages. And they don't come close to meeting the standard for an antitrust claim based on false advertising. Again, for the same reasons. They are not alleging they were foreclosed from the market as a result of it. They're not alleging they're unable to compete. They're not alleging they're unable to contradict those statements. If anything, the allegations shows

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they're plenty able to fund studies that they claim disprove Apple's advertising and put it out in the world. For both antitrust injury and antitrust conduct, these are separate bases on which the claims should be assessed.

I'm happy to move on to the market definition or move on to false advertising and --

THE COURT: Why don't you move on to false advertising.

MS. MILICI: Thank you, Your Honor.

So for the false advertising claim, there's, again, like, a fundamental mismatch between what they're saying Apple said is false and why they say it's false. So there's a mismatch between the facts that they say the statements are false and the statements themselves, and I can talk about that in a second.

In addition, they have again failed to allege any proximate cause between what's the injury to Masimo from these ads and what are the steps in between. Just to illustrate that point, if you look at their allegations about what it is Apple said and you look at it on the

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blood oxygen feature, they have three paragraphs in their counterclaims that describe a 2020 launch, and there's a video of that launch. That video is available on YouTube. They also allege that there have been articles that came out since then that they say the blood oxygen feature doesn't work unless you use it right. That's what those articles say.

Even if you were to take the articles to mean what Masimo says they do, their product didn't come out until the end of 2022. I think their theory is that people who were looking for the blood oxygen monitors at the end of 2022 are going to go to YouTube, pull up the video, watch the first 15 minutes of it in which there's general discussion about blood oxygen monitoring, and no statements made -- but then they're going to take a misimpression from that about Apple and then not read anything else and then not buy the W1 instead.

And I think they have not alleged those chains, the steps of the chain of causation, which as we see in the case, like *Lexmark*, but also *Mispresto*, you need to allege in order to plead a false advertising claim. Just saying

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they said this thing years ago and I lost sales, it's not enough. There has to be some plausible allegation of the steps in the causation there.

When we look at the particular statements, I just rewatched that video this morning. It does not say what Masimo claims its study proves is false. It's statements about the Apple watch generally, statements about what blood oxygen is, what blood oxygen measurements are used for, and statements that you can measure your blood oxygen with the Apple watch. There's no statement in that video or any of the other ads that they are citing that says that this is -- that this is the same. It's suitable to replace a hospital-grade monitor. That's just not in these statements.

And I think when you look at that, it's clear that there's just a mismatch between what they're doing -- and I'm going to leave aside, of course, we have very serious criticisms of the study that Masimo did -- and -- but we'll stay in the four corners of the complaint for this argument.

I would say the same thing on the IRN features where, again, the statements that they're referring to in their counterclaims say that the Apple Watch will check for irregular rhythms and irregular rhythms may be suggestive of A-fib. That's the statement.

And then they cite to a Mayo Clinic study that said not everybody who mentioned the Apple Watch when they presented to the ER had a clinically actionable diagnosis when they leave there. I think when you read the study, limitations of the study, that suggests it can't be read the way Masimo wants to. Even if you were to accept their representation of it, there's no statement where Apple ever said if you get this notice, it means that when you get to the ER that you will at that point have a diagnosis that's going to be caught. Again, it's a mismatch between what they say are false statements and the facts that they say prove that they are false.

So, Your Honor, I'm happy to answer any questions on any of these things.

THE COURT: No, that was very helpful. Thank you very much. I appreciate



it.

MS. MILICI: Thank you.

THE COURT: Let's hear from the other side. We gave Apple a little extra time. You're welcome to have the extra time as well if you need it.

MR. POWELL: Thank you. My name is Adam Powell for counter-claimant Masimo, and I'll start with the inequitable conduct claims.

And I want to start where counsel started, which is this idea of who conducted or who was responsible for the inequitable conduct. There's a lot of discussion of a mishmash, where we have supposedly some allegations that are unclear as to whether they're directed at Mr. Meyers or the named inventors or Apple as a whole, and I think that's wrong.

If you look as to each individual person, I'll give you some examples, is that Mr. Meyers is one of the individuals responsible for, again, like you said, selecting which firm is responsible for each aspect. And Masimo has alleged that Mr. Meyers withheld information and concealed information, took affirmative



steps to prevent the disclosure of material information to the Patent Office.

Now, we have separately alleged that Apple did not disclose the information to the Patent Office. Those allegations about Apple as a whole are really important for the -- but -- for materiality because if Mr. Meyers concealed the information but someone else disclosed it, Apple may say it's not material. That's why we say nobody disclosed it from Apple and then we say Mr. Meyers specifically concealed it and he intended to deceive the Patent Office.

The same is true for the named design inventors. The allegation isn't directed to them collectively. We used a defined term to save space. It could have been separate paragraphs for each individual person. The idea also isn't that these named design inventors, just by virtue of the fact they developed the material, they must know it's functional. That's not the allegation. The allegation is they worked with the engineers who do know the functional aspect of the design. They were aware of the functional



aspect because of the way they worked with the engineers that developed the functional aspect. Again, that --

I just don't think there's any mishmash. The complaint is very specific and deliberate as to who did each thing, and if you look at Meyers alone, we pleaded everything we need to plead, that he had knowledge of this functional aspect, that he had knowledge of the withheld art, and that he deliberately concealed that information from the Patent Office.

Now, Apple also argues that this is a novel theory, that the idea of selecting two different law firms, one law firm to prosecute design patents, a different one to prosecute utility patents, a third one to assert some of those same patents against Masimo in IPRs they're saying is a novel theory, and nothing supports that. They've not cited any caselaw dismissing the allegation from a complaint.

And I think that's what's important here, is that the Patent Office is specific that you don't have to allege someone actually signed a paper and submitted it to the Patent Office. The allegation is that the person has to be

substantively involved in the prosecution, and one way you can be substantively involved is deliberately picking who to prosecute the patents so that you can keep information away from the Patent Office.

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And as Your Honor pointed out, it's sort of fundamentally unfair to say, well, he deliberately chose different people to prosecute these applications, and he did so for the specific purpose of withholding it from the Patent Office so that Apple could obtain patents that he knew were invalid and then to say he didn't actually sign the paper itself so therefore you're off the hook. There's no caselaw that supports that. It's not supported by the regulations that state who has a duty to disclose. And the allegation that, hey, this is commonplace and Apple does it all the time, look, that may or may not be true. That is a factual dispute, though. It can't be resolved in the pleadings.

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Our allegations are very specific. They must be accepted as true and all inferences have to be in our favor at this stage, and we can see what discovery will yield and whether

we can ultimately prove our claims of Mr. Meyers' intent.

So I also wanted to talk about this idea that Mr. Meyers, they said, is false. His name never appears in the prosecution history. This was in our opposition. His name is on the customer list; right? That's the issue is, there's a -- I'm sorry. Not customer list. A customer number; right? That's the customer number of everybody that has power of attorney in that particular application, and we dealt with that in our opposition.

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And Apple responded with this case in their reply, *Digital Ally*, and they said that *Digital Ally* held a customer number in no way indicates any role or responsibility in prosecution. That's incorrect.

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If you look at this *Digital Ally* case, there's a couple problems with it. Number one, it was not addressing inequitable conduct or the standards at the pleading stage. What it was addressing is whether a prosecution bar should apply far and wide. And Apple didn't quote the holding of the case. They quoted a

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declaration from the plaintiff in that case that stated that "this customer number listing for a Reese includes all practitioners in the firm who are licensed to practice before the USPTO but in no way indicates any role or responsibility for prosecution on behalf of that client." It was a specific factual allegation made by one of the parties in that case. It was not Court holding that a customer number in no way indicates role in prosecution.

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I'll move on briefly to the false advertising. My colleague will be addressing the antitrust allegations include those allegations that they relate to false advertising, but on the merits of the false advertising claim, we also have this argument that there's a mismatch between the facts and the proximate cause and what actually happened here and what the allegation -- or what the video says.

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Counsel indicated that they reviewed the video and it doesn't actually support an argument that Apple is advertising blood oxygen as clinically acceptable. The issue there is our complaint is very specific that -- and I'll quote it. This is paragraph 143 states that

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"Apple falsely and continually associates the Apple Watch's pulse oximetry feature with medical use and reliable measurements." We then go on to have six paragraphs explaining and quoting from all of the different advertisements. It's --

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The argument is, well, we never actually said it's clinically acceptable. No, what you did is you had a whole bunch of advertisements that created that impression to the consumer, and that's a false and misleading impression because even Apple is not arguing that its blood oxygen is actually accurate. The reality is the studies and various different third-party --

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(Loud noise in the courtroom.)

THE COURT: Is everyone all right?

MR. PHILLIPS: Knocking them over.

MR. POWELL: What's in the complaint is we have studies referenced, we have statements from third parties all indicating that the blood oxygen feature is not reliable. And in fact, some of those third parties came out and said, look, Apple is misleading consumers. We have that in our complaint where

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the third parties say Apple is convincing customers to use this in a way that's inappropriate, and they have this sort of fine-print disclaimer and they think that
10:34AM immunizes them. But the reality is people are going to use this thing for medical purposes when they have no justification for doing so.

Again, this is all pleaded in the complaint beginning at paragraph 143. The
10:35AM allegations are very specific. And really all I'm hearing from counsel is disagreeing about the facts, and those facts, again, that's a question for another day. At this point, they need to be accepted as true.

10:35AM And just very briefly on IRN, the irregular rhythm notification. This is the same argument, is that, well, customer, Apple says it may be indicative of a problem. The reality is 90 percent of people that went to
10:35AM the hospital didn't have any new actionable issue. Now, Apple says it's actually 60 percent of them because some of them had an existing problem; right? Well, you've still got 40 percent false positive. About half of
10:35AM the people that appear in the hospital don't

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need help, and that's the problem, is Apple is advertising the Apple watch as getting you help when you need it. That's the quote. "When you need it." About half of the people at least,
10:36AM even reading the article the way Apple wants to read it, which would be improper at this stage, about half of the people don't need help.

So the reality is, again, we have very specific allegations. This is a factual
10:36AM dispute on the false advertising material. The allegations need to be accepted and taken all inferences in our favor at this point.

So the only thing I'll add is, of course, if there's some reason, some deficiency, of
10:36AM course, there's more allegations that could be added if we needed to amend, and I don't think Apple is seriously asking for dismissal with prejudice. It was mentioned one time in a conclusion, so there's really no support or
10:36AM argument for that.

With that, unless you have any further questions.

THE COURT: No, thank you.

MR. POWELL: Thank you.

10:36AM MR. LARSON: Good morning, Your Honor

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Steven Larson for counter-claimant Masimo before the Court. I'll address the antitrust issues. I didn't hear argument about the market power and definitions. I'll skip those
10:37AM unless the Court has any questions.

THE COURT: No questions.

MR. LARSON: I'll start where counsel started with Walker process, and counsel argued that our theory runs squarely into the Third
10:37AM Circuit precedent. The *TransWeb* is the Federal Circuit's leading Walker process case. It was an appeal from the District of Delaware applying Third Circuit precedent. We also cited the *Garden* case which a District of
10:37AM Delaware case that denied summary judgment of Walker process claims where the only allegation of injury was attorney's fees and also there was lost opportunities that were investment opportunities that were alleged. That was all.

10:37AM In this case, we allege, certainly, attorney's fees. We also allege lost opportunities, lost investments or lost business opportunities, harm to our business reputation. And we explain, similar to what
10:38AM *TransWeb* calls for, why Apple's conduct,

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Apple's assertion of fraudulent patents, if successful, would harm competition. You saw in *TransWeb* a really beautiful explanation on why you focus on the harm to competition that would
10:38AM result in the scheme is successful. The Federal Circuit explained the focus is on the competition reducing act is filing a lawsuit asserting fraudulent acts.

In its reply, Apple pointed to the *Otsuka* 10:38AM case to argue what the Federal Circuit said attorney's fees are not antitrust injuries, that was really not what it meant. It was really just talking about damages, not antitrust injury, and the *Otsuka* case is a
10:38AM decision from the District of New Jersey. But this Court, in *Azurity* -- that's 2023 Westlaw 157732 -- rejected that interpretation from the *Otsuka* case and said no, the *TransWeb* case means what it says. Attorney's fees spent in
10:39AM response to a lawsuit asserting fraudulent patents are antitrust injury.

THE COURT: What's the case you just mentioned?

MR. LARSON: *Azurity*. It's 2023
10:39AM Westlaw 15732. So that's three Delaware cases

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supporting our view of *TransWeb* and how it should apply here.

Our allegations are very similar. We explain in our complaint that what Apple is trying to do here, again, they're pretty open about it. They filed this lawsuit, and they sought expedited discovery because they might seek a preliminary injunction. They sought to expedite the schedule because of potential harm they think will result to the market shares and our product competing. They alleged in the complaint that -- eventually what they argued is our product is so powerful that it could reach potentially 100 percent of the market.

10:39AM And this is exactly what a Walker process case is about, a party that asserts fraudulent patents to stop competitors who actually have the possibility of opening up competition, displacing their market position, displacing their monopoly power. So I think we clearly have an antitrust injury for the Walker process. That's straightforward. If we manage this injury of Walker process, we have standing for all the theories.

10:40AM Apple said we don't explain our antitrust

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injuries for the other theories. That's not true. In our brief, we pointed to paragraphs where we explained why those other theories aren't competition. There wasn't much argument about that in the brief, but I can go into more detail on those.

If you have antitrust injury on on theory, at that point you need to look at the overall anti-competitive scheme, which we do. And Apple argues you can't add lawful conduct and lawful conduct to come up with an anticompetitive scheme, but clearly asserting a fraudulent patent is anti-competitive, and if that is accepted, then you look at the overall scheme.

I'll move on now to predatory infringement and, essentially, the arguments in the briefs was essentially there should be a bright-line rule that patent infringement can never be anticompetitive, and we show there is no bright-line rule like that for the Federal Circuit, and that makes a lot of the sense. And we cited the *Styles* case that said, well, it was part of an overall scheme of conduct in that case. The Court allows the allegations to

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go forward, including allegations of intellectual property theft, and that was in California.

And we think it really makes sense here, and we explain in great detail in our complaint that Apple has a practice. Apple calls it efficient infringement. We would call it predatory infringement, which is Apple identifies a market, identifies a technology leader, purports to meet with the technology leader, but ends up taking their technology and eventually displaces the technology leader and does so through, first of all, imperfect theft. In other words, instead of lawfully working with the technology leader, takes the technology in a way that implements it imperfectly, which spoils the market, which harms the market. If Masimo is coming out with its watch now without Apple already being out there with a pulse oximetry feature that doesn't work well, I think the market would be in a much better position to receive our product. And instead what you see is a combination of conduct of Apple pulling out all the stops, essentially, to try to stop us in

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our tracks, stop the new product that Apple recognizes is so powerful that it might substantially erode Apple's market share.

It does that through, first of all, taking our technology and imperfectly implementing it which spoils the market, engaging in false advertisement which hides the fact of the flaws in its own technology, which is even worse because once consumers experience that -- they expect Apple -- if anybody is going to have a product that works well, it's going to be Apple. They see pulse oximetry doesn't work well, and that harms the market, hurts us.

10:42AM Also, as we're about to launch our product, Apple exploits its power over IOS apps to prevent our competing health app from being able to be approved and does it through affirmative conduct, not just failure to deal, lack of deal, does it through, essentially, trying to acquire confidential information under false pretenses, is our allegation. And in that case, we cited the *Ally* court case where the court denied a motion to dismiss where the allegation was Apple was using its

power over IOS apps to harm the competing app, to prevent that competing app --

In our case, not only do they harm our competing app, but they harmed our actual competing product in the nascent health watch market just as it was being where released, basically making it a worse product. It is not something that's just happened to Masimo. It happened to many companies. It happened to Alive Core. This harm to composition is not just harm to us, and I think if you look at the overall scheme, it would make sense that we would allege all these allegations as Apple pulling all the stops out to try to stop us in our tracks to try to stop us from releaseing our product.

Going to monopoly leveraging, as we said, we allege affirmative misconduct. It's not simply a lack of a duty to deal. We point out that Apple uses the developer agreement, section 9.23, where Apple says we can use whatever confidential information you give us for any purpose and uses its power over IOS apps to try to obtain confidential information through that process. And again, it's not just



harm to Masimo. Apple has done this to other companies, including Alive Core.

False advertising, as I mentioned, this is part of the overall scheme where Apple tries to hide the fraud in the imperfectly acquired technology. Apple again -- the pattern here is you don't really see them squarely addressing our allegations, at least in the briefing. To show whether or not plausible, Apple argues bright-line rules. They say you have to show that it's clearly false, but we cited caselaw including the pages -- including the pages that explains it doesn't have to be clearly false. It could be false or misleading. It doesn't have to be knowing.

And Apple also argues, well, you have to show that you couldn't correct the false advertising, but Apple cites cases where for, example, the defendant sends a mailer to hospitals that had some statements that were arguably not true, and the Court said, well, the plaintiff could easily send the same mailer and correct those statements. In our case, you have Apple, largest company in the world, basically a household name. I read a report



that it spent probably $12 billion in advertising in 2020, which is probably more than Masimo's revenue, and the idea that Masimo, which is still relatively unknown in the consumer market, is going to put out an advertising campaign that undoes the harm in the public when it perceives Apple as a company that's always going to have the best products, the harm from that false advertising just doesn't make a lot of sense.

In fact, in our complaint, we point out there's an article in the *Washington Post* and *Verge* that point out the flaws in Apple's technology but that hasn't corrected the problem.

We think to the extent the allegations are required on that, we can provide it, but we think what we have a sufficient, and the pages confirm false advertising. Our allegations are plausible, and I think they should go foward.

I just make a brief note on fair competition, which is that we point out that even if the conduct that's pointed to doesn't rise to the level of violating the Sherman Act, it would still be an incipient violation under



California's unfair competition law, and we pointed to the *Epic* case from the Northern District of California. I want to point out since then the Ninth Circuit affirmed that case and affirmed that under California law, even if conduct doesn't quite rise to the level of violating the Sherman Act, there can still be an incipient violation. And of course, we think we more than satisfy showing that Apple violated the Sherman Act.

If you think about it, incipient violation, when you have a company like Masimo on the cusp of providing that product, this amazing product that would actually displace Apple's dominant position, open up the market, bring competition, reduce prices, provide more choices, and Apple engages in all this conduct to stop us in our tracks, we certainly think that shows at least an incipient violation.

Unless Your Honor has questions, I think that's all.

THE COURT: Very good. Thank you very much. We'll just give you a couple minutes to make a reply.

MS. MILICI: Thank you. I appreciate

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the opportunity. There are a couple things that counsel said that I really want to respond to.

One is this idea that if they make it a Walker process claim that means that they have standing to seek broad discovery into anything Apple has ever done. That is not what the caselaw says. The caselaw is clear that they have to state -- they have to plausibly allege claims in order to have standing to bring those claims.

THE COURT: Let me just ask that because this is always tricky for us. So they have a count that says attempted monopolization, and they alleged a lot of conduct in there. And I heard them say -- I'm thinking out loud here, just so you know -- I heard them say as long as we allege one type of anticompetitive conduct, we could move forward with the claim. You would agree if that was right, they could move forward with the claim. You're just saying they can't move forward with discovery about other types of anticompetitive conduct and conduct that independently states the antitrust claim?

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MS. MILICI: I think there's authority dealing with this both ways. From the District of Delaware, there's the *Thompson Reuters* case where the court -- there was one Section 2 claim with two different forms of conduct and the the court dismissed the Section 2 claim based on one kind of conduct. And it's clear when you read the counterclaims, they're saying each of these are independent claims. I as well as collective claims, so I think they should be viewed individually.

There's a decision from Judge Boseberg in DC in the Section 2 claim where he said this theory is not viable because it's part of a single claim. I'm not going to dismiss the claim, but you're not going to get discovery on the non-viable theory because that would be an absurd result. That would mean every time somebody has one theory and they have one exclusionary contract theory that means that they can just say anything and get discovery on it, and that's just not the law. And I would point the Court to cases like *New York v. Facebook* which really lays out why this is and explains that, basically, otherwise nonviable

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claims about unilateral refusals to deal would be -- would have to go to discovery and would be the subject of litigation and *Trinko* and other case law explains why that shouldn't be. This is unilateral conduct we're talking about, and as you recognize in *Simon* and other cases, there's a chilling effect if we allow claims that don't have a plausible antitrust theory to go forward because they happen to be thrown it. And it encourages plaintiffs to throw in everything they think of no matter how plausible so that they can impose incredible discovery allegations on the defendant.

THE COURT: Understood. And again, I'm thinking out loud here. I think what's challenging for the Court in this particular case given these particular parties and their history of litigation against each other, arguments about burdens of discovery are maybe taken with a degree of skepticism, and I don't -- but I get it. I get what you're saying.

MS. MILICI: If I could just respond to that point because I think we've been engaging in discovery. They served discovery

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requests. Some of the requests are asking for things like, basically, every app store review that Apple has ever done based on the thinnest of allegations. That hasn't been the subject of discovery in any litigation between the parties. That's brand new litigation, brand new discovery and not suggested by any of the allegations in the complaint.

I will also say that counsel got up here and talked about this supposed theory they steal trade secrets. That's being litigated in the Central District of California. That cannot be relitigated here. The Central District of California case, when it has a decision, it will be res ajudicata. It's not an antitrust injury anyway, but certainly they don't get a second bite of the apple. Judgment as a matter of law was granted against them in some of the claims by Judge Tilghman, and jurors voted six to one among them on the others until a mistrial was declared. Those issues are going to be decided there. They're not antitrust issues to begin with, but they certainly don't get to come here and repackage then them as antitrust violations and get a

different result than they got the first time.
THE COURT: I understand.
MS. MILICI: Just to make a couple arguments on that. I was surprised to hear
10:52AM Apple stand here and talk about how Apple prevented them from releasing an app. Those apps are available. It's not true that Apple prevented them from releasing them. It's not true that they gave Apple any confidential information. So they'll ask for allegations that when you look at what they wrote down, don't make any sense, and they have not provided -- they have not identified any unlawful conduct.
10:53AM THE COURT: Maybe one way to address that concern that you have -- and I'm not making any rulings today, so don't feel like you need to jump up. But that I say, okay, to the extent there are some disputes about
10:53AM discovery where they want every App Store review -- I'm going to handle discovery for this case -- you come back to me, and I say, look, that's not going to happen or I say, look, you've already got a bunch of discovery.
10:53AM If you think that the trade secret



misappropriation stuff is relevant, maybe it is, and maybe it isn't, but you've already got the discovery. Do you understand what I'm saying? Could we deal with some of that that
10:53AM way?
MS. MILICI: Your Honor, they haven't satisfied *Twombly* on the App Store allegations, and the entire point of *Twombly* is that you shouldn't go forward with antitrust discovery
10:53AM unless you can meet the pleading requirements, and for these App Store allegations, as Your Honor said in *Simon and Simon*, companies have the ability to choose who they will deal with and on what terms, and they have not alleged
10:54AM anything, any unlawful conduct -- first of all, they did claim that as to the scheme -- on page nine of their brief, they say they're not bringing that claim, and they have not identified any unlawful conduct. They don't
10:54AM cite a single case saying that a company can't ask for information from people who it deals with. I think they have to meet the pleading requirements of this claim before they can seek discovery. I think that's a fundamental
10:54AM principle.



THE COURT: Okay. I understand your point. Thank you.
MS. MILICI: And just -- I didn't hear them anywhere say anything about proximate
10:54AM cause for -- on these advertisements. Like, at the end of the day, there is no link between the advertisements that they say are false and any harm to them, and that's the point that we were making, Your Honor.
10:54AM THE COURT: All right. Thank you.
MS. LIMBECK: Your Honor, if I could address a couple of the points they made on inequitable conduct.
They made this argument that Mr. Meyers
10:55AM was substantively involved in the prosecution of the applications because he was listed among 50 or 100 attorneys under Apple's customer number for those applications. But first of all, that is not anywhere in their pleading.
10:55AM They did not actually allege that he's listed on the customer number or has power of attorney.
Second of all, even if they had alleged that, that is not enough to show substantive
10:55AM involvement. This district -- we cited a case



from Judge Andrews where he dismissed inequitable conduct allegations for two attorneys for failure to disclose, failure to show duty of disclosure because they were just
10:55AM listed as power of attorney with five other attorneys and they weren't substantively involved in the prosecution.
And the Federal Circuit told us what "substantive involvement" means. It means
10:56AM involvement with the content of the applications, and they have not alleged that Mr. Meyers had any involvement with these particular applications at all.
And the other thing they say is, well,
10:56AM Mr. Meyers and others at Apple generally hire multiple law firms. Again, that does not show that Mr. Meyers himself specifically was substantively involved in any of the applications. It shows the opposite. Outside
10:56AM counsel prosecuted these applications, not Mr. Meyers, the chief of IP at Apple.
And then with respect to their other points, they keep saying we've made these allegations and you should take them as true.
10:56AM But that does not meet the heightened pleading

standard for inequitable conduct. They actually need to plead particular facts that identify a specific individual and particular facts from which you can reasonably infer that 10:57AM that particular individual had knowledge of specific references that were withheld, and they have not done that here for Mr. Meyers, and they haven't done it for all 21 of the design inventors.

10:57AM In fact, they admit the only allegation they have against the design inventors is that they were involved in development. If that were enough for inequitable conduct, every single defendant that pleads invalidity could 10:57AM also plead on information and belief the inventors must have known the patent was invalid for this reason or that reason; therefore, we have an inequitable conduct claim against the inventors. That would eviscerate 10:57AM the heightened pleading standard, and Your Honor should not allow that sort of an argument here.

So they can move forward with their invalidity arguments. We disagree with them, 10:58AM obviously, but they cannot just rely on their



own invalidity contentions to then argue that someone specific actually committed some sort of misconduct that would rise to the heightened pleading standard for inequitable conduct here.

10:58AM THE COURT: All right. Thank you very much.

If you feel like you need to respond, you can because we did give them some extra time, but there's no requirement.

10:58AM MR. LARSON: First of all, I really disagree with how you characterize our discovery. We didn't serve any requests remotely like that that I recall. And as Your Honor pointed out, that can be handled on discovery to the extent the requests are too broad.

Second, on particular theories of antitrust, I don't think this is a good forum to decide the economics of our theories because 10:58AM Apple primarily argues bright-line rules. We argued about the bright-line rules. We think to the extent particular theories are going to be addressed, they should be addressed with expert testimony on the economics, if anything 10:59AM in summary judgment, and you should look at the



conduct as a whole, which will be developed at that time.

And third, Apple mentioned that it approved our health app, but that was after we 10:59AM filed a lawsuit, and we mentioned and show in our complaint a repeated pattern, and certainly the fact the Apple eventually allowed the app doesn't undo the harm at the critical moment of our launch, and certainly doesn't undo the harm 10:59AM to competition as a whole.

THE COURT: Just to make sure I understand, sorry, there was a delay in Apple approving on the App Store, but the app is approved now?

10:59AM MR. LARSON: The app is approved now, but the only thing I would say in our complaint is not just that there was a delay or they refused to approve it, it's a pattern we see where they're seeking confidential information 10:59AM from it, and they use Section 9.3 of the agreement that we discussed in our complaint, which says they can use whatever confidential information they get for whatever purpose. And you see a pattern of trying to get the 10:59AM confidential information. They're directly



competing with the Health Watch product.

THE COURT: I understand we're going outside the pleadings now, but I'm trying to understand what's going on here. You didn't 11:00AM give them the confidential information?

MR. LARSON: We did. We resisted giving them confidential information.

THE COURT: They had it from the other case; right?

11:00AM MR. LARSON: Depending on what confidential information -- we were very careful about making sure Apple itself did not have it. And like I said, this is not just us. It's also Alive Core. In that case, Alive 11:00AM Core -- Apple was not allowed at all, so there's a pattern here. We think, certainly, it's a part of the overall scheme and part of the overall conduct that we think would be relevant here in providing analysis of.

11:00AM THE COURT: You all reminded me that I've written a lot about antitrust cases, but I'm still newer to this than I know a lot of you are. Because this is an attempted monopolization claim, is it relevant to intent 11:00AM even though it didn't cause any harm?

MR. LARSON: First of all, it would be relevant to intent, absolutely. Intent is also shown by conduct in antitrust cases, but certainly actual intent, evidence taken during 11:01AM discovery, the actions they engaged in to try to block us would absolutely be relevant.

To clarify, we are also asserting monopolization. Both monopolization and alternative attempt at monopolization, the 11:01AM theory being that even if they don't have market share now for us to assert that they're trying to maintain or bolster the monopoly power, the conduct is such that there's a dangerous probability that if the scheme were 11:01AM successful, they would attain that monopoly power, that market share.

THE COURT: Right. But for the Walker process, that can only be attempted.

MR. LARSON: In the *Garden* case it 11:01AM was both monopolization and attempted monopolization. And in *TransWeb*, it was attempted monopolization, which may be what Your Honor is thinking of. And certainly the theory the harm that will result if the scheme 11:01AM is successful is particularly powerful in the



attempt -- as to the attempted claim, but we think it's equally applicable to a monopolization claim because really the difference is for attempt, you're looking at 11:02AM the dangerous probability the scheme will result in obtaining monopoly power. For monopolization, you're pointing to the same conduct but the theory is the conduct will help maintain the monopoly power as opposed to lose 11:02AM it or bolster it. They're pled in the alternative.

THE COURT: Monopoly maintenance. Thank you.

So we went a little longer today than we 11:02AM allotted, but that's okay because I always enjoy hearing from my learned friends in the antitrust bar, so here's what I'll say. We took a lot of time before the hearing today to try to be repaired for today's hearing, and we 11:02AM heard the argument today. We're going to go back and look at some of the cases that you all referred us to, but I do want to get you an answer on this, both because it's fresh in my mind and I also know that discovery is ongoing 11:03AM and on a short schedule. I'm just not going to



be ready to do that for you today, and Monday is a new federal holiday.

So what I'd like to do is have you back on the phone for me on Tuesday, and that way I 11:03AM can just read my report and recommendation, and we'll have the court reporter take it down to make a record of it. So we'll put on order on the docket today. I think we'll try to do it probably mid to late morning, but we'll just 11:03AM give you the court's dial-in number. If we could have one attorney for each side to dial in to receive the ruling, that would be sufficient.

I think that concludes everything. I 11:03AM know we've got a couple outstanding matters that have come in on the docket with respect to the discovery or protective order dispute or stipulation. We'll get to that as soon as we can. As you all, I'm sure, are aware, it's a 11:04AM constant barrage that comes in, so we try to triage as much as we can.

All right. We'll be in recess. Thank you.



C E R T I F I C A T E

STATE OF DELAWARE )
) ss:
COUNTY OF NEW CASTLE )

I, Deanna L. Warner, a Certified Shorthand Reporter, do hereby certify that as such Certified Shorthand Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 22-CV-1377-MN-JLH, *APPLE INC. Vs. MASIMO CORP, et al.*, heard on June 15, 2023.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 56 typewritten pages, is a true copy of said MOTION HEARING.

SIGNED, OFFICIALLY SEALED, and FILED with the Clerk of the District Court, NEW CASTLE County, Delaware, this 16th day of June, 2023.

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Deanna L. Warner, CSR, #1687
Speedbudget Enterprises, LLC

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